CITATION: 567 College Street Inc. v. 2329005 Ontario Inc., 2019 ONSC Number
COURT FILE NO.: CV-15-540873
DATE: 20191125

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
567 COLLEGE STREET INC.	)	*R. Nguyen*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
2329005 ONTARIO INC.	)	*S. Alexanian*, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** September 16-25, 2019

O'BRIEN, J.

REASONS FOR JUDGMENT

Overview

[1] This case relates to the failed sale of a property on College Street in Toronto. It involves a dispute between the seller and buyer, but also the buyer and its own lawyer. The issue between the buyer and seller relates to the use of the third floor. The property is three stories, with a storefront on the ground floor, office space on the second floor, and residential units on the third floor. At the time the parties entered into the Agreement of Purchase and Sale (the "Agreement"), the third floor was being used for residential units. However, after having entered into the Agreement, the buyer discovered that the third floor had been converted improperly to residential units by a previous owner. The primary issue between the buyer and seller is whether the buyer properly "requisitioned," or raised its concerns about the third floor, in accordance with the time lines for doing so in the Agreement.

[2] The seller is a company called 567 College Street Inc. The buyer is a numbered company, 2329005 Ontario Inc. In order to avoid using numbers, I will continue to refer to them as the "seller" and the "buyer." As the seller's name suggests, the property in issue is located at 567 College Street. The seller submits that the buyer did not requisition the third-floor issue and,

therefore, it lost any opportunity to refuse to complete the sale on the basis of the illegal use of the third floor. As I will discuss further below, a "requisition" is a statement of requirements for the completion of a real estate transaction. A requisition that addresses issues provided for in the agreement of purchase and sale must be completed by the date provided for in the agreement. A requisition that goes to the "root of title" may be made any time before closing.

[3] The buyer provided a deposit of $250,000 to its realtor when the parties entered into the Agreement. The seller now seeks a declaration that the deposit is forfeited. In addition, it seeks damages for out-of-pocket expenses related to the aborted transaction. Meanwhile, the buyer submits that it properly requisitioned the illegal use of the third floor. However, if it is unsuccessful on that point, it submits that the transaction was unconscionable. The buyer focuses particularly on the fact that the seller sold the property two years later for a better price. The buyer submits therefore that it should be entitled to relief from forfeiture of its deposit. It also submits that the improved purchase price mitigated any losses related to the seller's out-of-pocket expenses.

[4] A significant focus of the two actions before me was on the buyer's claim against its real estate lawyer, Harry Hong. The buyer submits that Mr. Hong failed to advise the principal of the buyer, Yong Jo, of the need to provide the seller with a specific requisition regarding the illegal use of the third floor. Even if he did provide advice to Mr. Jo on this point, the buyer submits that his advice was insufficient and failed to meet the standard of a reasonably prudent solicitor. Meanwhile, Mr. Hong rejects this version of events entirely. He submits that he expressly advised Mr. Jo of the need to requisition the third-floor issue. According to Mr. Hong, Mr. Jo, with the assistance of his architect, purposely ensured that the City of Toronto issued a work order on the property. Mr. Jo's plan was to use the work order as leverage in negotiations as the closing date approached. Mr. Hong emphasizes that Mr. Jo signed an acknowledgment that he was proceeding against Mr. Hong's advice.

[5] For the reasons set out below, I conclude that the buyer did not properly requisition the issue of the third floor's illegal use. Accordingly, it was in breach of the Agreement when it refused to complete the transaction. Further, in my view, the transaction was not unconscionable. I accept the evidence of Mr. Hong over the evidence of Mr. Jo. Specifically, I accept that Mr. Hong advised Mr. Jo of the need to requisition the third floor's illegal use, but that Mr. Jo decided not to do so. Instead, he intentionally obtained a work order on the property in an effort to receive an abatement on the purchase price prior to closing. In this context, the transaction was not unconscionable and the buyer is not entitled to relief from forfeiture of its deposit. I also conclude that the advice Mr. Hong provided to Mr. Jo met the standard of a reasonably prudent solicitor.

Issues

[6] The issues as between the seller and the buyer are:

(1) Did the buyer requisition the illegal use of the third floor pursuant to the terms of the Agreement?

(2) If not, did the third floor's illegal use go to the root of title so that it could be raised any time before closing?

(3) Was the transaction unconscionable? Is the buyer entitled to relief from forfeiture?

(4) Is the seller entitled to damages for out-of-pocket expenses arising from the transaction?

[7] The issues between the buyer and Harry Hong are:

(1) Did Mr. Hong fall below the standard of a reasonably prudent solicitor by failing to advise Mr. Jo of the need to make a requisition regarding the illegal use of the third floor?

(2) In the alternative, did Mr. Hong fall below the standard of a reasonably prudent solicitor in the advice he provided?

Did the buyer properly requisition the illegal use of the third floor?

[8] In my view, the buyer did not requisition the illegal use of the third floor, as required by the terms of the Agreement. The buyer relies on an informal e-mail from its realtor, Julie Seo, as its requisition. However, the seller submits that the e-mail does not meet the requirements of a requisition and was never intended to be a requisition. I agree with the position of the seller.

Law regarding requisitions

[9] A requisition is a "statement of requirements for the completion of a real estate transaction. The requirements normally relate to the provisions of the agreement of purchase and sale, to matters of title, to zoning and municipal matters, and to the documentation needed to complete the transaction": *Weeks v. Rosocha*, (1983), 41 O.R. (2d) 787 (C.A.), at para. 23. Requisitions are important, as they are the buyer's opportunity to require the seller to take steps to fulfill the requirements of the agreement of purchase and sale. With some exceptions, requisitions must be made by the deadline specified in the agreement of purchase and sale, otherwise the buyer has foregone the right to complain about the issue.

Facts relating to 232's purported email requisition

[10] In this case, the Agreement provided for both an "on-title" and an "off-title" or "special" requisition period. Requisitions on-title are those that arise as a result of a review of title. Special requisitions, or off-title requisitions, do not arise from a review of title and instead arise from the terms of the Agreement itself. In this case, the Agreement entered into between the parties was dated February 19, 2015. The buyer had until February 26, 2015 to complete any on-title requisitions. Under the terms of the Agreement, it also had until March 28, 2015 to make special requisitions. Specifically, as set out in s. 8 of the Agreement, it had until March 28, 2015 to "... satisfy [it]self that there are not outstanding work orders or deficiency notices affecting the property, that its present use (commercial/residential) may be lawfully continued and that the principal building may be insured against risk of fire."

[11] The buyer did not make any requisitions prior to the on-title date, February 26, 2015. On March 4, 2015, Julie Seo wrote an e-mail to one of the owners of the seller, John Ferreira. In addition to being one of the owners, Mr. Ferreira was a real estate lawyer and represented the seller on the transaction. The buyer now relies on the March 4, 2015 e-mail as constituting a requisition.

[12] Ms. Seo wrote the March 4 e-mail after receiving the results of searches conducted by Mr. Jo's architect, Dae-Wa Chung. Mr. Chung, who was a retired architect and had practised for many years, knew Mr. Jo, and agreed to assist him as a favour. Mr. Chung attended with Mr. Jo for an inspection of the 567 College Street property on February 23, 2015. During the inspection, Mr. Chung became concerned that the third floor had not been legally converted to residential use. This is because there were no parking spots for the residential apartments and some of the apartments did not comply with building code requirements for windows. Mr. Chung relayed his concerns to Mr. Jo. The concerns were particularly relevant to Mr. Jo because Mr. Jo intended to add a fourth floor to the building for additional residential apartments. The third-floor residential apartments would need to be legal before he could do so.

[13] Mr. Chung then conducted searches of City records to determine whether a permit had ever been obtained. On March 4, 2015, he wrote an e-mail to Mr. Jo to advise that he had not found any permits. This e-mail, which I will discuss again further below, reads as follows (Mr. Chung's first language is Korean, but he wrote here to Mr. Jo in English, with various typographical errors):

> Mr. Jo,
>
> I [s]earched entire building permit drawings 3 times but I can not find any building permit drawings for 3rd. floor apartments.
>
> 2nd & 3rd floor approved (1980) by Building Department ONLY medical offices.
>
> I guess building owner converted medical offices to residential apartments without bui[l]ding permits.

City of Toronto, Building System Record (as I attached last e-mail) show medical & dental offices, not described any residential.

Fir[s]t place 3rd floor needed building permits as soon as possible.

You should raise this issue through your agent – discount building price or building permits by owner's expense then closing deal.

I will be back Toronto Monday.

Regards,

Dae-Wha Chung

[14] Mr. Jo forwarded this e-mail to Julie Seo, who, the same night, wrote an e-mail to Mr. Ferreira. This is the e-mail that is now being put forward as a requisition. It reads as follows:

Hi John,

Hope all is well with you.

Was the 3rd floor always residential?

If not pls confirm that the proper permits were issued for the construction.

The purchaser's architect can't find any drawings and or permits on file with the city re: 3rd floor apts.

Best regards,

Julie

[15] Mr. Ferreira responded to the e-mail the following morning to advise that he had limited information on the issue, but that the third floor had been residential for the entire period of the seller's ownership of it. He wrote:

Hi Julie,

When the current owner purchased the property 10 years ago, the third floor was already residential, and has always been so throughout the current ownership.

However, we were told in the past that the top floor was originally office space, and that the previous owner (or perhaps the one prior) carried out the conversion.

Other than that, we don't have any documents or information on the issue.

I hope this helps.

Kind regards,

John

[16] Ms. Seo did not respond to Mr. Ferreira's e-mail. The buyer never followed up with the seller to request that it seek documents or otherwise take steps on the issue.

Analysis

[17] I conclude that Ms. Seo's e-mail did not constitute a requisition. Although Ms. Seo wrote "pls confirm that the proper permits were issued for the construction," in the context of the e-mail as a whole and the dealings between the parties, the e-mail was a request for the seller's information about the conversion, but it was not the buyer requiring the seller to confirm the permits. First, the e-mail was written in an informal manner, and was not from the buyer's lawyer. In addition, it did not expressly require the seller to take any steps. The buyer has not provided me with any authority to support an e-mail of this type from a real estate agent being interpreted as a requisition. Further, it is clear from Mr. Ferreira's response that he interpreted the e-mail as a request for information and not as a requisition. Neither Ms. Seo nor anybody else on behalf of the buyer ever followed up to suggest that they wanted more than simply Mr. Ferreira's own information on the subject. I note that Mr. Hong subsequently wrote to the seller on March 26, 2015 with a formal letter of requisition. In that letter, he did not make any reference to the e-mail, nor did he follow up in any specific way on the issue of the third floor's illegal use. As further detailed below, the City of Toronto ultimately issued a work order with respect to the illegal use of the third floor. Mr. Hong specifically followed up and requisitioned the work order, by letter dated April 14, 2015. However, in this letter, he again did not reference the March 4, 2015 e-mail.

[18] In short, the March 4 e-mail was not written as a requisition, was not intended to be a requisition, and the parties did not treat it as a requisition during the course of the transaction. Therefore, it does not qualify as a requisition of the third-floor issue in time for the deadline in the Agreement.

Did the third-floor illegal use issue go to the root of title?

[19] The buyer's alternate position is that the illegal conversion of the third floor and the associated work order went to the "root of title." Issues that go to the root of title may be requisitioned up until the date of closing. Therefore, if the third-floor issue went to the root of title, Mr. Hong's requisition letter of April 14, 2015, which was prior to closing, would have constituted a proper requisition of the issue. However, I do not accept that the illegal use of the third floor and the associated work order went to the root of title.

Law and analysis regarding issues going to root of title

[20] A matter goes to the root of title where it involves a "total failure of consideration." A number of cases describe matters going to the root of title as follows, quoting a former Chief Justice of Ontario, the Honourable W.G.C. Howland Esq., Q.C., in "Objections to Title," found in the 1960 Law Society of Upper Canada Special Lectures:

> If there is a total failure of consideration and the purchaser would receive nothing at all, not even possession of the property, an objection to title on such grounds would go to the root of title – for example, if the vendors were selling in their capacity as trustees and they had no power to sell; or if part of the land were forfeited and vested in the Crown; or if the vendor's title might be set aside on grounds of undue influence. Title is the foundation of the contract. Apart from the situation where the vendor has no power to sell, it is difficult to define accurately what objections go to the root of title.

[21] See *Klein v. Mernick Construction Co.*, 1978 CarswellOnt 3092 (Ont. Supreme Court, High Court of Justice), at para. 10; *Vandervliet v. 639708 Ontario Corp.,* 1994 CarswellOnt 721 (Gen. Div.), at para. 12.

[22] The seller has provided me with numerous authorities to the effect that by-law issues are not issues that go to the root of title. In Donald Lamont, Lamont on Real Estate Conveyancing, 2nd ed., (Toronto: Carswell, 1991), the author states at p. 10-16: "Zoning and building by-laws have been held to be a matter of land use, not title." In *Brar v. Smith*, 2014 ONSC 5030, after the title requisition period, the purchasers discovered that the vendor's use of the property was not a legal use. The purchaser argued that the illegal use by the vendor constituted a defect that went to the root of title. The Court held that the vendor's illegal use was "in effect a violation of the bylaw" and went on to say that "a bylaw violation is not a matter of title" (at para. 59) and did not go to the root of title. See also *Jackson v. Nicholson* (1979), 25 O.R. (2d) 513 (H.C.), at para. 12; *Innes v. Van De Weerdhof*, [1970] 2 O.R. 334 (H.C.), at para. 26.

[23] The buyer relies on *1854822 Ontario Ltd. v. The Estate of Manuel Martins*, 2013 ONSC 4310, to argue that a work order constitutes a matter that goes to the root of title. In that case, there was an active building permit regarding work proposed for the garage on the premises. The Court concluded that the open building permit created potential risk and exposure to the purchaser, and, therefore, went to the root of title.

[24] I consider that case to be distinguishable. A significant amount of case law and other authorities clearly state that bylaw violations do not go to the root of title. In the specific circumstances of *1854822 Ontario Ltd*, the court's concern was with the existence of the open building permit. While, in the case before me, there was a work order at the time of closing, the key distinction, which I will elaborate on further below, is that I conclude the buyer sought the work order. To the extent the buyer would be exposed to the risks of the work order, it is a risk it created itself. The fact that the seller unknowingly was using the third floor illegally would not

itself have been a matter going to the root of title. In my view, the buyer cannot alert the City to the problem, cause a work order to be issued, fail to requisition the issue by the specific requisition deadline, and then claim that the illegal use goes to the root of title. In the circumstances of this case, the seller was in compliance with the Agreement and the buyer failed to make a valid objection to title.

Was the transaction unconscionable?

[25] The buyer in this case further argues that it should be granted relief from forfeiture on the basis that the transaction was unconscionable. It submits that the indicia of unconscionability are not closed and that I should take into account factors including the following:

1. There was an inequality of bargaining power between the parties, particularly given that, in the buyer's submission, it was not well-served by its lawyer, Mr. Hong;
2. The bargain was substantially unfair because the buyer would be required to spend large sums to rectify the deficiency due to the illegal use of the third floor; and
3. The seller did not suffer any real losses as a result of the failure of the transaction, since it sold the property for a million dollars more than the original agreed-upon purchase price two years later.

Facts related to claim the transaction was unconscionable

[26] I do not agree with the buyer that the transaction was unconscionable. My assessment of the facts accords more closely with the theory put forward by the seller. Overall, I conclude that Mr. Jo purposely sought a work order for the property to use as leverage in seeking an abatement of the purchase price. As Mr. Jo created the situation that led to the work order and also purposely failed to requisition the issue by the date required in the Agreement, it is not inequitable for buyer to forfeit the deposit.

No inequality of bargaining power

[27] As a starting point, I do not accept that there was an inequality of bargaining power between the parties. The Defendant buyer is a real estate investment company. It is owned by Mr. Jo and his wife. Mr. Jo is a businessman and real estate developer. He is a director, officer and shareholder of 12 or 13 companies worth a combined value, in his estimation, of over $100,000,000. Mr. Jo has been involved in ten commercial real estate transactions in the past ten years and currently owns four commercial investment properties. He is the landlord to 42 commercial tenants and one residential tenant. He also owns and operates six Tim Horton's franchises. I conclude that Mr. Jo is an astute businessman with extensive experience in real estate issues.

[28] In addition, the buyer had legal counsel on the transaction, Harry Hong. Mr. Hong was called to the bar in 1999 and, at the time of the transaction, had over 16 years practising as a real estate lawyer. His practice is primarily residential and commercial real estate, and he estimates that he completes approximately 500 real estate transactions per year.

[29] Finally, I note that the buyer approached the seller about the sale of the property. The property was not for sale on the market, but Ms. Seo approached Mr. Ferreira to ask whether the owners would be interested in selling. Mr. Ferreira invited Ms. Seo to submit an offer in writing, which she did. The buyer made an offer, the seller counter-offered, and the parties ultimately agreed on a price of $5M. In other words, the buyer sought this property as an investment and successfully negotiated its purchase price. There were no indicia of unconscionability in the manner of the transaction.

Mr. Jo intentionally obtained the work order

[30] I conclude that Mr. Jo purposely sought to have a work order issued on the property in order to gain bargaining leverage. I reach this conclusion for a number of reasons. The first is that Mr. Jo's architect contacted the City for an inspection even after he already knew the third floor had been illegally converted. There was no reason at that time to request an inspection other than to obtain a work order. In addition, Mr. Hong testified that Mr. Jo intentionally sought a work order. Although Mr. Jo denies this, as discussed further below, I accept the evidence of Mr. Hong over that of Mr. Jo.

[31] Mr. Jo's first attendance at the property for an inspection was on February 23, 2015. As set out above, his architect, Mr. Chung, attended with him and advised him that he had concerns that the third floor was being used illegally for residential apartments. In other words, by as early as February 23, 2015, Mr. Jo knew there was an issue with the third-floor use.

[32] At that time, Mr. Jo still had three days to requisition this issue before the on-title requisition deadline of February 26, 2015. Further, pursuant to the Agreement, the offer to purchase was conditional until February 26, 2015 (the due diligence period) for the buyer to inspect the building and do an environmental assessment. The Agreement provided that "If for any reason whatsoever that [sic] the buyer is not satisfied with his inspection of the building and/or the environmental study of the building, then this offer will be null and void and the deposit shall be returned in full with no bonus or penalty and this offer shall be null and void" (my emphasis added). Therefore, pursuant to this provision, the buyer was entitled, at that time, to cancel the agreement on the basis of concerns about the third-floor issue. Mr. Jo did not cancel the transaction and did not raise the issue with the seller. He did sign a waiver of conditions with respect to the transaction on February 26, 2015, such that the Agreement then became unconditional.

[33] Mr. Jo explains that he signed the waiver of conditions only after having spoken to Harry Hong the day before, on February 25, 2015. Mr. Jo's evidence is that on that day, he was travelling to Palm Springs and called Mr. Hong from the airport. He says that he told Mr. Hong about the architect's concerns about the third floor and asked Mr. Hong to look into the issue. According to Mr. Jo, Mr. Hong advised him that if anything was wrong with the property, the vendor would have to fix it. Otherwise, Mr. Jo would not be required to close the deal.

[34] However, on the topic of this phone call and many other issues, Mr. Hong's evidence was entirely different. Mr. Hong testified that this phone call never occurred. His evidence was that Mr. Jo did not consult him before signing the waiver of conditions. According to Mr. Hong, he only learned about the third-floor issue on March 4, 2015, when he received a copy of the architect's e-mail to Mr. Jo reproduced above.

[35] There was no independent evidence of the alleged February 25, 2015 phone call. As discussed in detail below, I accept the evidence of Mr. Hong on this issue and in general, over the evidence of Mr. Jo. I conclude below that Mr. Hong's evidence was more credible than that of Mr. Jo.

[36] After his architect raised concerns about the legality of the third-floor conversion, Mr. Jo did not raise any issue with the buyer. Instead, he instructed Mr. Chung to find out through the City of Toronto whether there were any permits authorizing the conversion. Mr. Chung testified that his purpose in contacting the City was to obtain confirmation that the third-floor use was illegal. If it was illegal, the buyer would need to obtain the proper permits and complete any required work for the third floor before proceeding with construction of a fourth floor.

[37] I conclude, however, that over time, the primary reason for Mr. Chung's inquiries with the City became to obtain a work order on the property. I reach this conclusion after examining Mr. Chung's e-mails with Mr. Jo and communications with the City, as well as considering the testimony of the City building inspector.

[38] First, Mr. Chung appears to have been certain that the third floor was illegally converted after his initial searches but continued to take multiple steps with the City after that time. On March 4, 2015, he wrote the e-mail to Mr. Jo, duplicated above. In my view, the e-mail confirms that, by that time, Mr. Chung knew the third floor was illegally converted. In the e-mail, Mr. Chung said that he had searched the building permit drawings three times and could not find any permit drawings for the third floor. He said the second and third floor were only approved for medical offices. He suggested that the owner had converted the medical offices to residential apartments without building permits. It is clear he had reached a conclusion on this issue, as he indicated that the third floor would need building permits as soon as possible. He also recommended that Mr. Jo should raise this issue with his agent in order to obtain a discount on the price or building permits at the owner's expense before closing the deal.

[39] On the same day, Mr. Chung sent a further e-mail to Mr. Jo, this time in Korean. In that e-mail, again, in my view, he confirmed that he had reached a conclusion that the third floor had been converted illegally to residential apartments. In the second e-mail, he stated: "Therefore, it is my opinion that it was definitely renovated without permission." He again recommended that Mr. Jo either complete the purchase only after the current owner obtained the building permits and passed an inspection or that he try to obtain a lower purchase price.

[40] In fairness to Mr. Jo, he did forward Mr. Chung's first March 4, 2015 e-mail to his real estate agent, Ms. Seo, and she then made the inquiries of Mr. Ferreira discussed above. However, as also discussed above, Ms. Seo's inquiry was an informal e-mail and not a formal requisition. When Mr. Ferreira responded in a similarly informal manner to say that he had little information on the issue, Mr. Jo did not take any further steps to raise or requisition the issue with the seller.

[41] After Mr. Chung's conclusion that the third floor was illegally converted, he continued to communicate with the City to obtain an inspection of the property and a work order. Although Mr. Chung explained that his purpose for doing so was to obtain confirmation that the conversion was illegal, I do not accept that this was the primary reason. As set out above, I find that Mr. Chung already had concluded that the conversion was illegal. In addition, the City building inspector testified before me. His evidence was that the City received a "complaint" about 567 College Street. Although Mr. Chung denied that his request to the City was a "complaint," his e-mail to the City requests a building inspection on the basis that the third floor was converted without permits and that there were "no parking space[s] at all." The e-mail does not read as an inquiry for information but, rather, as a demand for an inspection. The City inspector considered it to be a complaint and testified that it was unusual, in his experience, for the purchaser of a property to request an inspection.

[42] Further, when the City subsequently obtained the work order, Mr. Chung immediately called Mr. Jo and, when he did not reach him, sent him an e-mail to report that the City had issued the work order. I note that in this e-mail, there is no reference to the issue of the fourth-floor apartments, which supposedly was the reason Mr. Chung was pursuing confirmation with the City. Again, the evidence suggests that, more than anything else, Mr. Jo was anxious to find out when a work order had been issued.

Mr. Hong's Evidence

[43] My conclusion that Mr. Jo intentionally sought a work order from the City also is based on the evidence of Mr. Hong. In many instances, Mr. Hong's evidence directly contradicts the evidence of Mr. Jo. After careful consideration, I conclude that Mr. Hong is more credible and I accept his evidence over the evidence of Mr. Jo when they conflict. I will first summarize Mr. Hong's evidence about the work order and failure to requisition the third-floor issue. Then I will explain why I accept it over the evidence of Mr. Jo.

[44] Mr. Hong was retained on this transaction only after the Agreement had been signed. He had been retained by Mr. Jo in the past and, on approximately February 17, 2015, Mr. Jo contacted him about this transaction. However, Mr. Hong did not become formally involved until Mr. Jo sent him the signed Agreement on February 20, 2015. At that time, Mr. Hong conducted the on-title searches and as well as an execution search. He reported the results back to Mr. Jo, advising that there were no issues with title other than the first and second mortgage, which the seller would have to remove on closing in any event.

[45] Mr. Hong testified that he was not involved in the inspection of the property and that Mr. Jo did not consult with him before signing the waiver of conditions. The first he heard about any issues regarding the property was on March 5, 2015, when Mr. Jo's property manager, Chris Baek, forwarded Mr. Chung's March 4, 2015 e-mail in which he said he was not able to find any building permits. According to Mr. Hong, he then spoke with Mr. Jo about this issue on March 10th or 11th. At that time, they discussed Mr. Chung's findings, but Mr. Jo told him to hold off on taking any steps regarding the third-floor issue.

[46] Mr. Hong's evidence was that the next time he spoke to Mr. Jo was on approximately March 14 or 15, 2015. By that time, Mr. Hong was becoming a bit more concerned about timing because there were only two weeks until the special requisition date. Mr. Hong advised Mr. Jo that he needed to requisition the third-floor issue. He told Mr. Jo that if he did not requisition it, he would not be able to terminate the deal and he would be obligated to purchase the property in spite of the third-floor issue. At that time, Mr. Jo instructed Mr. Hong to stop all work on the file. He did not say why, but Mr. Hong thought he might be considering cancelling the deal. Mr. Hong then ceased work on the file.

[47] Mr. Hong's next contact from Mr. Jo was on March 24, 2015. At that time, Mr. Jo wrote an e-mail to Mr. Hong and Chris Baek attaching a draft letter he had written. The draft was a proposed letter to the vendor, in which he adverted to the illegal conversion and requested that either the vendor obtain the permits and meet all city bylaws, or the vendor decrease the purchase price by $600,000. Mr. Jo's cover e-mail stated in part: "Please advise after reading the attached letter I drafted. We will discuss."

[48] I reproduce the text of the letter here because it was detailed, specific and sophisticated. I will return to a discussion of this letter later in the context of Mr. Jo's claims that he did not have a specific recollection of much of what occurred and relied on his lawyer to take care of everything.

> In light of recent finding [sic] that residential units at 567 College Street have been converted illegally without proper city permits, the Purchaser requests one of the following measures in regards to the purchase of the property.
>
> 1) Vendor to get legal permit(s) from the city retroactively after the fact. Vendor to meet all required city bylaws for the residential units. Purchaser will wait until this process is finished and purchase price will stay at $5.0 million.

2) Vendor will discount the purchase price by $600,000 to final purchase price of $4.4 million. Rationale follows below:

   a. Loss of income: $300,000
      - For the purchaser to apply for building permits and build new units fit to city bylaws, it is expected the process will take from 1 year to 18 months.
      - Expected loss of rental income during that period ranges from $85,320 to $130,000
      - Development fee: $90,000
        $15,000 per unit and 6 units
        Construction Cost: $90,000

        $15,000 per unit and 6 units
        Committee of Adjustment and Architect fee: $20,000

   b. Future Risk: $300,000
      - The property has no intrinsic parking spaces. There is a chance that Committee of Adjustment process will result in denial of permission for upper units' conversion to residential units.
      - If the space is ordered back to office space, there is additional construction cost and additional and perpetual residential income loss.

[49] According to Mr. Hong, he then met with Mr. Jo on approximately March 25, 2015. At that meeting, Mr. Jo advised him of his plan to have a work order put on the property. Mr. Hong advised Mr. Jo that this was a "bad idea." He advised Mr. Jo that there were other ways to deal with the issue, such as a requisition, and he advised him of the risks of proceeding in the manner he proposed. Mr. Jo told Mr. Hong not to worry, and that he was very confident about his plan. He said that the seller would not want to spend $600,000 just before closing or, alternatively, not close the deal and still have to spend $600,000. He was confident the seller would want to give an abatement and that it would be easier to get them to agree to the abatement if there was a work order on the property. His instructions were for Mr. Hong not to take any steps at that time. However, he agreed that Mr. Hong could send a standard requisition letter that did not specifically advert to the third-floor issue or work order.

[50] On March 26, 2015, Mr. Hong did send out a standard requisition letter. It did not reference the illegal use of the third floor, nor the pending work order. The Defendant has acknowledged that this letter did not constitute a valid requisition of the issue, as it was not sufficiently specific. See e.g. *Gelakis v. Giouroukos*, [1991] O.J. No. 636 (Gen. Div.), at p. 28.

[51] That evening, Mr. Hong spoke with Mr. Jo by phone. Mr. Jo advised that he was going ahead with obtaining the work order. According to Mr. Hong, Mr. Jo was adamant that Mr. Hong not send out any e-mails or communications to the seller. Mr. Hong agreed not to do so, but asked Mr. Jo to meet with him on March 28, 2015 to confirm his instructions.

[52] On March 28, 2015, a Saturday, Mr. Jo attended at Mr. Hong's office. He and Mr. Hong again discussed the ramifications of Mr. Jo's instructions not to requisition the third-floor issue. Mr. Hong had prepared an acknowledgment for Mr. Jo to sign. He reviewed the contents with Mr. Jo and Mr. Jo signed the document. The acknowledgment is discussed further below, but essentially it is an acknowledgment that Mr. Jo instructed Mr. Hong not to requisition the third-floor issue against Mr. Hong's instructions.

[53] On approximately April 7, 2015, Mr. Jo advised Mr. Hong that he had obtained an order to comply. On April 8, 2015, Mr. Hong received correspondence from the City in response to a letter from him and confirming the work order. On April 14, 2015, Mr. Hong wrote to Mr. Ferreira requiring the seller to provide proof that it had complied with the work order and/or had it discharged. Mr. Ferreira then wrote to Mr. Hong stating that the buyer was out of time to make such a requisition.

[54] According to Mr. Hong, the first time Mr. Jo ever suggested he was not going to close the transaction without an abatement was on the day before closing, April 29, 2015. Mr. Jo had been consistent until then in his position that he wanted an abatement, but this was the first time he indicated that he would not close without one. Mr. Hong also testified that on April 28, 2015, he discussed a letter from Mr. Ferreira of that date with Mr. Jo. In the letter, Mr. Ferreira stated the following: "If your client refuses to close, then the Seller will consider the deposit forfeited and will commence a court action for damages."

Mr. Jo's Evidence

[55] Mr. Jo's evidence with respect to his dealings with Mr. Hong was entirely different. Mr. Jo denies that he purposely sought a work order for leverage in negotiating the purchase price. First, as set out above, Mr. Jo claims that he called Mr. Hong from the airport on February 25, 2015 to raise the third-floor issue with Mr. Hong. Mr. Hong denies any such phone call.

[56] Mr. Jo's evidence is that after the March 4, 2015 e-mails from Mr. Chung indicating his concerns about the third-floor use, he spoke to Mr. Hong. Mr. Jo did not provide precise evidence about particular discussions with Mr. Hong. Instead, he testified that Mr. Hong told him "many times" that when there was a City work order or illegal use issues, the landlord was obligated to fix it. Mr. Hong apparently told him there was nothing to worry about.

[57] With respect to the draft letter Mr. Jo prepared and e-mailed to Mr. Hong on March 24, 2015, he testified that he had "discussions" with Mr. Hong about the letter. He does not remember the "exact date," but "this was discussed many times." He also testified that he instructed Mr. Hong to send the letter to the seller and that he intended for Mr. Hong to send the

letter to the seller "immediately." This is even though the e-mail accompanying the letter said "please advise" after reading the letter and "we will discuss." Later, on cross-examination, Mr. Jo acknowledged that he had not instructed Mr. Hong to send the letter.

[58] Mr. Jo agrees with Mr. Hong that they met on March 25, 2015. When asked what was discussed at the meeting, Mr. Jo said that they talked about the property and "damages and recovery based on Mr. Chung's advice." When asked more specifically what was discussed at the meeting, Mr. Jo said that he had met with Harry Hong a number of times and he did not remember. His evidence was that, generally, when he met with Harry Hong in March 2015, Mr. Hong told him "many times" that if there were any problems with 567 College Street, such as work orders or illegal use, the seller would have to fix it "or we can just walk away." He testified that Mr. Hong told him that if the City issued a work order, he could get his deposit back.

[59] With respect to the acknowledgment dated March 28, 2015, Mr. Hong's evidence was that, although his signature appears to be on the document, he does not recall signing it. He signed many "piles of documents" where Mr. Hong told him to sign. He did not discuss this particular document with Mr. Hong and does not recall ever seeing it until after this action was commenced. He also testified that on March 28, 2015, he visited a house he owned on the Toronto lake shore. He did not meet with Mr. Hong that day. The buyer's theory is that Mr. Hong surreptitiously included this document among the other closing documents on April 29, 2015 and then pointed to places where Mr. Jo was required to sign.

[60] Mr. Jo also did not recall receiving copies of correspondence sent out or received by Mr. Hong. He does not recall receiving, for example, the correspondence with Mr. Ferreira, in which Mr. Hong requisitioned the work order issue, nor letters from Mr. Ferreira, in which Mr. Ferreira said that the buyer was out of time to make requisitions. Again, Mr. Jo's evidence was that none of this was discussed with him. Mr. Hong never raised requisition dates and "always" told him that "if there were any problems they would have to fix it." When asked about whether he had received copies of correspondence or other documents from Mr. Hong, Mr. Jo's response was that he did not look at them, as that was his "lawyer's job."

[61] Mr. Jo's recollection of the April 29, 2015 meeting with Mr. Hong was that Mr. Hong told him that they needed to bring funds for the purchase price to the closing to prove they were prepared to proceed. Mr. Hong again apparently told him that the seller was required either to fix the problem, or Mr. Jo would get his deposit back and be entitled to walk away from the transaction.

[62] Mr. Jo's evidence also was that, even after the aborted closing, he believed he would get his deposit back. Shortly after the aborted closing, he retained Mr. Hong to represent his company on the purchase of another property on Bloor Street in Toronto. The sale of this property closed in November 2015. According to Mr. Jo, when dealing with Mr. Hong on the Bloor Street property, he continued to ask Mr. Hong when he would get his deposit back. Mr. Hong apparently told him that he would get his deposit back, and not to worry.

Mr. Hong's Credibility

[63] I accept the evidence of Mr. Hong over the evidence of Mr. Jo generally where they conflict, and with respect to the work order in particular. Specifically, I find that Mr. Jo did have a plan to obtain a work order to use as leverage in negotiating the purchase price for the property. I also find that Mr. Hong advised Mr. Jo about the need to requisition the third-floor issue and that, on closing, his deposit would be forfeited. My reasons for preferring the evidence of Mr. Hong include the following:

- Mr. Hong responded to questions on examination and cross-examination in a thoughtful and specific manner. He was able to recall what had occurred when and to provide details of meetings and conversations. His evidence was internally consistent. Mr. Jo, by contrast, regularly said that he did not remember what had been said during a phone call or meeting with Mr. Hong. In spite of having met with Mr. Hong several times and having had approximately ten phone calls with him during the course of this transaction, the only thing he could remember discussing with Mr. Hong was Mr. Hong's purported advice that he could still close the deal, or he would get his deposit back. His limited recall of only these points strikes me as self-serving.

- Mr. Jo's repeated response that he did not review documents or information because it was his "lawyer's job" and he could leave it up to his lawyer to take care of everything does not accord with his other actions. Specifically, Mr. Jo was sufficiently involved in the details of the transaction to be the person directing Mr. Chung with respect to the inspection and work order, and to be receiving detailed updates from Mr. Chung. In addition, Mr. Jo's draft letter, sent in the March 24, 2015 e-mail, was sophisticated, detailed and specific. Although Mr. Jo testified before me in Korean, with an interpreter, his ability to do business in English is evidenced by this letter. The letter outlined in detail two options for closing the transaction, in light of the third-floor's illegal use, and included details of how Mr. Jo had calculated loss of income and future risk. It showed that Mr. Jo was very much engaged in the question of how the sale could be completed in light of the third-floor issue.

- I do not accept that Mr. Hong never spoke to Mr. Jo about requisitioning the third-floor issue. Mr. Hong was an experienced real estate lawyer who understood the need to requisition before the special requisition date in the Agreement. This was clear in his evidence before me and is also consistent with the signed acknowledgment dated March 28, 2015, which was the last date of the special requisition period. There is nothing in the evidence to convince me that Mr. Hong was overwhelmed, as submitted by the buyer, and failed inadvertently to follow through on this important issue in this transaction.

- Mr. Jo's evidence that he did not sign the acknowledgment on March 28, 2015 is not plausible. Mr. Hong has a specific recollection of scheduling the meeting with Mr. Jo to sign the acknowledgment on a Saturday, when his office otherwise would be closed. The acknowledgment does not include a witness line, as there were no staff present to act as a

witness on a Saturday. It is implausible that Mr. Hong hid this document among other closing documents and that Mr. Jo signed it over a month later without realizing it. This is a very serious allegation. There is no independent evidence to support Mr. Hong having engaged in this kind of deceptive conduct. To the contrary, Mr. Hong's evidence presented as forthright, thoughtful and competent. The most believable explanation for the signed acknowledgment is the most straightforward one: Mr. Jo's signature is on the document, and the document is dated March 28, 2015 because Mr. Jo knowingly signed the document on that date.

- I similarly do not accept that, after the aborted closing, Mr. Hong continued to tell Mr. Jo that he would get his deposit back. There is no basis for Mr. Hong to say this and I do not find it plausible that he would continue to say this when he knew it would not occur. In a letter dated April 28, 2015, Mr. Ferreira wrote to Mr. Hong, stating that if the buyer refused to close "the Seller will consider the deposit forfeited and will commence a court action for damages." Mr. Hong met with Mr. Jo the following day to sign the closing documents. It is implausible to me that he did not communicate the contents of this letter to Mr. Jo. In addition, in November 2015, Mr. Hong referred Mr. Jo to a litigation lawyer to prepare a claim in Small Claims Court against the seller, claiming out-of-pocket expenses related to the transaction. The draft claim (which was never issued) did not claim for the deposit. However, a paragraph at the end of the draft claim stated that the Plaintiff reserved the right to sue in the Superior Court of Justice for other damages, including release of the existing deposit. Again, this suggests that Mr. Jo was advised and was aware that the seller considered the deposit to be forfeited.

Law and analysis related to forfeiture of deposit and unconscionability

[64] Where a transaction involving the sale of land does not close due to default by the purchaser, the vendor is entitled to the deposit amount, without first having to prove actual damages: *Mikhalenia v. Drakhshan*, 2015 ONSC 1048, at para. 31; *De Palma v. Runnymede Iron & Steel Co.*, [1949] O.J. No. 495 (C.A.). The use of the word "deposit" will imply that the payment is intended for forfeiture upon the purchaser's breach. This is because deposits at common law are meant to secure the performance of a contract and are distinguishable from payments on account of the purchase price: *Kandasamy v. Merseyside Holdings Ltd*, 2016 ONSC 2205, at paras. 26-27. Therefore, I conclude in this case that the seller is entitled to the deposit, subject to the buyer's claims for relief of forfeiture.

[65] Section 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 authorizes courts to grant relief from forfeiture. In determining whether to grant relief from forfeiture, a court will consider a two-step test:

1. Whether the forfeited deposit was out of all proportion to the damages suffered, and
2. Whether it would be unconscionable for the seller to retain the deposit.

Redstone Enterprises Ltd. v. Simple Technology Inc., 2017 ONCA 282, at para. 15.

[66] In this case, the seller does not claim to have suffered damages. However, the fact of not having suffered damages does not alone render the forfeiture unconscionable: *Redstone*, at para. 17.

[67] A finding of unconscionability is context specific. While the indicia of unconscionability are not closed, some factors that are useful to consider include: inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of bona fide negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties: *Redstone*, at para. 30.

[68] Here, I conclude that it would not be unconscionable for the seller to retain the deposit. There was no inequality of bargaining power between these parties. Mr. Jo was a sophisticated and experienced businessman, with particular expertise in real estate. The parties were unknown to each other and, indeed, the buyer approached the seller with the offer to purchase the property. Most importantly, although the bargain ended up being less favourable to the buyer than it originally intended, this was due to its own actions. That is, I have found that Mr. Jo purposely sought a work order on the property to use as leverage for an abatement of the purchase price. He ignored his lawyer's advice to requisition the issue and took the risk that his negotiating position would be better with an issued work order. In these circumstances, it is not unconscionable for him to suffer the consequences of having taken that risk.

Is the seller entitled to damages for out-of-pocket expenses arising from the transaction?

[69] The seller claims damages totaling $35,490.58, representing out-of-pocket expenses arising from the aborted transaction. These expenses are comprised of the costs of refinancing the mortgage, costs of an architect to investigate and submit plans to address the work orders, additional property management expenses related to the transaction, and legal fees for the aborted sale.

[70] The buyer submits that these claims are statute barred by the *Limitations Act*, 2002, S.O. 2002, c. 24. However, at the outset of trial, I allowed the seller College to amend its Statement of Claim to specifically claim these expenses. In my view, these claims are not statute-barred. Although they were not specifically itemized in the original Statement of Claim, the plaintiff did seek, from the outset, a declaration that it was entitled to the deposit of $250,000 and in the alternative damages of $250,000 for breach of contract. To the extent it amended the claim for damages by specifically seeking out-of-pocket expenses in addition to the deposit, rather than damages in the alternative, this is, at its highest, a refinement of the remedy it seeks, and not a new cause of action. See *Dee Ferraro Limited v. Pellizzari*, 2012 ONCA 55.

[71] In addition, there was no prejudice to the buyer in allowing this claim. The seller provided particulars of its out-of-pocket expenses in response to questions on examination for discovery in 2017, over two years before the commencement of trial.

[72] The buyer also submits that the seller is not entitled to these expenses on the basis that it fully mitigated its damages when it sold the property two years later for $6M, an increase of $1M over the purchase price negotiated between the parties. In my view, the subsequent sale of the property two years later at a better price does not mitigate the damages owed to the seller. Ordinarily, the date to assess damages arising from the breach of an agreement of purchase and sale is the date of closing. The court may choose a different date depending on the context, but where the vendor retains the property to speculate on the market, damages will be assessed on closing: *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.), at para. 41.

[73] Here, I conclude that damages should be assessed on the date of closing. The buyer approached the seller to purchase the property. It then breached the Agreement and at the same time obtained a work order from the City, which complicated the seller's ability to sell the property. Further, the out-of-pocket expenses were specific to the aborted transaction. The seller would have had additional costs when it ultimately sold the property two years later, such as legal fees for the second transaction. In all of the circumstances, the subsequent sale two years later should not be treated as mitigation of 567 College's out-of-pocket expenses.

[74] That said, I do not accept that all the expenses incurred by 567 College were consequences of the aborted transaction. The mortgage costs, for example, existed regardless of the Agreement. The seller's mortgage already was becoming due. When this transaction failed to close, the seller chose to refinance with a new mortgagee, which resulted in a number of additional costs. It appears that the expenses now claimed arose at least partly because the Bank of Montreal was a new mortgagee. The expenses include, for example, an appraisal of the property, which may not have been necessary with an existing mortgagee. However, the evidence before me does not support that the seller could not have continued by refinancing with its existing mortgagee. In his evidence, Mr. Ferreira testified that the seller decided to approach the Bank of Montreal as a new lender, but that their existing lender, People's Trust, did not refuse to renew their financing. Although there may have been some cost associated with continuing with People's Trust mortgage, I do not have evidence of those types of costs before me. On a balance of probabilities, I am not satisfied that the refinancing fees were a consequence of the failed transaction.

[75] I also do not accept that the expenses incurred by the seller in responding to the work order can be considered consequential damages of the aborted sale. These expenses consisted of the architect's fees to investigate and submit plans to address the work order. However, the seller did not engage in construction to address the work order. The ultimate buyer two years later purchased the property with the work order still on title. In my view, these were expenses that the seller chose to incur but that were not a consequence of the breach.

[76] I do accept that the seller expended legal fees for the aborted transaction in the amount of $5,045 and that these were a consequence of the aborted transaction.

[77] I further accept that the seller incurred additional property management expenses because of the failed transaction in the amount of $1600. These expenses were for services such as the property manager attending building inspections with the buyer, cancelling utility, insurance, and elevator accounts and subsequently reinstating them after the failed transaction.

Did Harry Hong fall below the standard of a reasonably prudent solicitor in his advice to and representation of the buyer?

[78] The buyer submits that Harry Hong fell below the standard of care of a reasonably prudent solicitor by failing to requisition the illegal third-floor use issue in time for the special requisition deadline. In the alternative, the buyer submits that, even if Mr. Jo instructed Mr. Hong not to requisition the third-floor issue, Mr. Hong did not sufficiently advise Mr. Jo of the consequences of this decision and did not ensure Mr. Jo understood his advice.

Law relating to standard owed by solicitor to client

[79] The standard of care required of a solicitor to his or her client has been described as that of the reasonably competent solicitor, the ordinary competent solicitor or the ordinary prudent solicitor. As stated by the Supreme Court of Canada: "A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken." *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at para. 58. As part of this, the solicitor has an obligation to ensure advice that he or she provides is understood by the client: *Mason v. Perras Mongenais*, 2018 ONCA 978, at para. 29. However, lawyers are not held to a standard of perfection: *Blackburn v. Lapkin*, [1996] O.J. No. 1261 (Gen. Div.), at para. 40; *Hill v. Hamilton-Wentworth Regional Police*, 2007 SCC 41, at para. 73.

Analysis of whether standard was breached in this case

[80] I conclude that Mr. Hong did not breach the standard of care owed to the buyer. With respect to the allegation that he failed to requisition the illegal third-floor use issue in time for the special requisition deadline, I have rejected Mr. Jo's evidence that Mr. Hong failed to raise the need to requisition this issue. Instead, I accept Mr. Hong's evidence that he did advise Mr. Jo to requisition the issue, but Mr. Jo instructed him not to do so. Indeed, it was because of these highly unusual instructions that Mr. Hong arranged for Mr. Jo to sign the acknowledgment.

[81] I also conclude that the advice Mr. Hong provided, including the acknowledgment that Mr. Jo signed, meets the standard of a reasonably prudent solicitor. The buyer submits that the acknowledgment did not meet the standard of care. It claims it was deficient in that it did not spell out that the buyer may lose its deposit if the transaction failed to close or that the buyer may be sued if the transaction failed to close. The buyer relies on *Turi v. Swanick*, (2002), 61 O.R. (3d) 368 (S.C.) for the proposition that if the acknowledgment supports the conclusion that what it outlines was discussed between the parties, it also supports the conclusion that what it does not outline was not discussed between the parties. The buyer also relies on *Morton v. Harper Grey Easton* (1995), [1995] B.C.J. No. 1356 (S.C.), at para. 34, for the following statement: "...all

other things being equal where there is a conflict between the version of the client and the version of the solicitor the version of the client is to be preferred."

[82] I agree that the acknowledgment did not expressly address the buyer's potential loss of its deposit, although it did address some consequences to the buyer of failing to follow Mr. Hong's advice. The acknowledgment read as follows:

> ACKNOWLEDGMENT OF 2329005 ONTARIO INC.
>
> WE CONFIRM AND ACKNOWLEDGE THAT:
>
> 1. You have advised us that we are still able to make title search requisitions including work orders, deficiency notices and unlawful use until today's date;
> 2. We have instructed you not to make any requisitions in respect to work order, deficiency notices and unlawful use, particularly but not limited to the third floor residential usage;
> 3. We confirm that you have advised against our instructions and that you have advised of the consequences that we will not be able to terminate the Agreement of Purchase and Sale, and will be contractually obligated to purchase the property despite any work orders, deficiencies, unlawful use or title issues, which may not conform to the by-laws;
> 4. We make this confirmation and acknowledgment of our instructions with full knowledge of the ramifications of same.
>
> DATED this 28th day of March, 2015.
>
> 2329005 Ontario Inc.
>
> [signature of Mr. Jo]
>
> ASO: Yong JO
>
> I have authority to bind the Corporation

[83] Both parties called eminent and experienced experts in real estate law to provide evidence regarding whether the acknowledgment met the standard of care. The buyer's expert, Craig Carter, opined that it did not. In his opinion, the acknowledgment was deficient including in that (1) it did not record the buyer's business goals and why the buyer did not want to requisition the third-floor issue; (2) it did not "bring home" that not only would the buyer have to close the deal, but if the third-floor issue was not requisitioned, then it would not get an abatement and would not be entitled to have the third-floor issue rectified; and (3) the acknowledgment did not deal with the risk that the buyer ultimately may elect to refuse to close and, in that instance, would lose its deposit and may be liable for damages.

[84] The seller's expert, Steven Pearlstein, was of the view that the acknowledgment did meet the standard of care. His opinion was that "much of the give and take of advice between solicitor and client is not necessarily recorded in detail in written instructions or acknowledgments." In this case, in his view, it was sufficient for Mr. Hong to confirm in the written acknowledgment that his advice was to submit a requisition, that if a requisition was not submitted, the client could not terminate the agreement, but would be required to complete the purchase and sale, and that the client had instructed him not to make the requisition. He did not think it was necessary to address the issue of an abatement, since, on the facts, no abatement was offered or accepted in this case.

[85] I accept the position of Mr. Pearlstein. While there is no question that the opinion provided by Mr. Carter could lead to an excellent acknowledgment that addressed all possible consequences, I agree with the submission of the seller that it sets a standard of excellence or perfection, but not the reasonableness standard required of an ordinary prudent solicitor. Further, there is some danger that an acknowledgment which addressed all possible consequences would not be perfect, as it could be overly detailed and confusing for a client to understand, depending on how clearly it was drafted.

[86] It is important to note that this is not a situation, as in *Turi*, where the acknowledgment does not address any consequences to the client at all. Rather, the acknowledgment addresses the consequence that was most relevant to Mr. Jo at the time. Mr. Hong's evidence is that, at the time the acknowledgment was signed on March 28, 2015, Mr. Jo had never suggested that he was considering not closing. Rather, Mr. Hong understood that Mr. Jo's intentions were to continue to close, but with the expectation that he would be given an abatement of the purchase price. Mr. Hong specifically addressed the consequence of that course of action in the acknowledgment—that is, that Mr. Jo would be obligated to purchase the property with the work order. In my view, addressing the particular course of action that was in issue at the time met the standard of a reasonably prudent solicitor.

[87] With respect to the argument that if something did not appear in the acknowledgment, then it was not said, I accept that Mr. Hong's advice did not focus on the loss of the deposit on March 28, 2015. However, Mr. Hong testified that he also spoke to Mr. Jo about the consequences of failing to requisition the third-floor issue on March 25, 2015, when he met with Mr. Jo. This was after Mr. Jo had sent him the draft letter to the seller requesting the seller to complete the work to bring the property into compliance, or for the seller to provide an abatement of the purchase price. Mr. Hong's evidence was that, at that meeting, he discussed with Mr. Jo all of the "permutations and combinations" of what could occur, including that the buyer would lose the deposit if it refused to close. He also discussed the fact that if the seller then sold the property for a lesser amount, the buyer would be responsible for any gap between the agreed-upon purchase price and the sale price to someone else. They also discussed the requisition date and that the buyer would not be able to terminate the deal on the basis of this issue if it did not requisition it. Further, they discussed the buyer's right to sue for an abatement if it requisitioned the issue and closed without an abatement.

[88] Although Mr. Jo does not agree that this advice was given to him, he also was not able to provide specifics of what was said at the March 25, 2015 meeting. I note that this meeting was arranged specifically to discuss the draft letter sent with the March 24, 2015 e-mail. I accept Mr. Hong's evidence that at a meeting to discuss Mr. Jo's detailed letter and his plan to use a work order to pressure the seller for an abatement, Mr. Hong did provide advice on various possible outcomes, including the buyer losing its deposit.

[89] I also do not accept that Mr. Hong failed to ensure Mr. Jo understood the terms of the acknowledgment. I have found that Mr. Jo was a sophisticated businessman with particular experience in real estate. He orchestrated the work order and had a good understanding of what was occurring in this transaction. He also had a good understanding of his discussions with Mr. Hong. This is evident from his draft letter attached to the March 24, 2015 e-mail, in which he laid out potential options for the purchaser. Although Mr. Jo testified before me in Korean, with an English interpreter, he completed a university degree in the United States in English. The draft letter attached to the March 24 e-mail provides evidence of his proficiency in English. Further, he communicated with Mr. Hong in both English and Korean, as both men speak both languages. Mr. Hong testified that he explained the terms of the acknowledgment to Mr. Jo and there was no suggestion that Mr. Jo did not understand what he was signing. I accept this evidence.

[90] Although the buyer has relied on the proposition that all else being equal, the version of events of the client should be preferred to the version of events of the solicitor, all else is not equal in this case. I have found that a meeting occurred on March 28, 2015, when Mr. Jo denied that meeting altogether. I also have found that Mr. Jo purposely sought a work order as leverage in negotiation and I have rejected his evidence that Mr. Hong never raised the issue with him of requisitioning the third-floor issue. I have found that Mr. Jo knew, at the time of closing, that the seller had said it would treat his deposit as forfeited, and I have rejected his evidence that Mr. Hong continually told him he would get his deposit back. In the circumstances of this case, all is not equal as between the evidence of the solicitor and the client because I have found the evidence of the client not to be credible throughout. Accordingly, this is not a situation where the tie favours the client. Rather, I accept Mr. Hong as having provided forthright and credible evidence and I do not accept the evidence of Mr. Jo with respect to the advice he was given by Mr. Hong.

[91] In short, I accept that on March 25, 2015, Mr. Hong advised Mr. Jo that the buyer could lose its deposit as one possible outcome. On March 28, 2015, when they met to sign the acknowledgment, he focused only on the outcome of the buyer completing the purchase, which is what Mr. Jo advised him at that time that he intended to do. In my opinion, the advice Mr. Hong provided to Mr. Jo, and his actions in having Mr. Jo sign an acknowledgment, met the standard of a reasonably prudent solicitor.

Costs

[92] If the parties are unable to agree on costs, they may provide me with submissions in writing of no more than four pages (not including attachments). The seller and Mr. Hong may provide me with their costs submissions within 14 days of this decision. The buyer will then have a further 7 days to provide its responding submissions. Costs submissions should be e-mailed to my judicial assistant, Anna Maria Tiberio, at AnnaMaria.Tiberio@ontario.ca.

Disposition

[93] The action brought by the seller is allowed and the third party claim against Mr. Hong is dismissed. I declare that the seller is entitled to the deposit in the amount of $250,000 currently held in trust by RE/Max Ultimate Realty Inc. I order the buyer to pay damages to the seller in the amount of $6,645. I also order the buyer to pay pre-judgment interest in accordance with the *Courts of Justice Act.*

O'Brien, J.

Released: November 25, 2019

CITATION: 567 College Street Inc. v. 2329005 Ontario Inc., 2019 ONSC Number
COURT FILE NO.: CV-15-540873
DATE: 20191125

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

567 COLLEGE STREET INC.

Applicant

– and –

2329005 ONTARIO INC.

Respondent

REASONS FOR JUDGMENT

O'Brien, J.

Released: November 25, 2019